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FIRST GENERAL COUNSEL'S REPORT

MUR 6807

DATE RECEIVED: April 14, 2014

DATE ACTIVATED: June 17, 2014

EARLIEST SOL: March 30, 2019

LATEST SOL: May 25, 2019

ELECTION CYCLE: 2014

COMPLAINANT:

Megan A. Carpenter

RESPONDENTS:

Erin McClelland for Congress Committee and
David Lazear in his Official Capacity as Treasurer
Erin McClelland
The Arche Wellness Foundation

RELEVANT STATUTES AND
REGULATIONS:

52 U.S.C. § 30101(8)(A)(i)¹
52 U.S.C. § 30116(a)(7)(B)(i)
52 U.S.C. § 30118(a)
11 C.F.R. § 100.17
11 C.F.R. § 100.52(d)(1)
11 C.F.R. § 109.21

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

Federal Communications Commission

I. INTRODUCTION

This matter concerns a television advertisement paid for and disseminated by the Arche Wellness Foundation ("Foundation"), a non-profit corporation founded and operated by Erin McClelland, a candidate for Congress in the 12th District of Pennsylvania. The advertisement, which featured McClelland, aired within 90 days of the May 20, 2014, primary election. The Complaint alleges that this advertisement was a coordinated communication made for the purpose of influencing a federal election and therefore constituted a prohibited corporate in-kind

¹ On September 1, 2014, the Federal Election Campaign Act, as amended, (the "Act") was transferred from Title 2 of the United States Code to new Title 52 of the United States Code.

1 contribution from the Foundation to McClelland. Respondents contend that the advertisement
2 was not a coordinated communication and that it satisfied the requirements of the Commission's
3 safe harbor for business transactions.

4 The record before the Commission indicates that the advertisement was a coordinated
5 communication that does not satisfy the regulatory safe harbor for communications that identify
6 a candidate only as an owner or operator of a business that existed prior to the candidacy. *See*
7 11 C.F.R. § 109.21; Coordinated Communications, 75 Fed. Reg. 55,947, 55,959 (Sept. 15, 2010).
8 The Commission could therefore find reason to believe that the Foundation made a prohibited
9 in-kind corporate contribution to McClelland in violation of 52 U.S.C. § 30118(a) (formerly
10 2 U.S.C. § 441b(a)). Nevertheless, based on the low dollar amount at issue, the advertisement's
11 lack of any electoral content, and the long-time role of McClelland as a public spokesperson for
12 the Foundation and its predecessor business, we recommend that the Commission exercise its
13 prosecutorial discretion and dismiss this matter with caution pursuant to *Heckler v. Chaney*, 470
14 U.S. 821 (1985).

15 II. FACTUAL AND LEGAL ANALYSIS

16 A. Background

17 Erin McClelland is currently a candidate for Congress in the 12th District of
18 Pennsylvania.² She filed a Statement of Candidacy with the Commission on March 18, 2013.
19 The Erin McClelland for Congress Committee ("Committee") is McClelland's authorized
20 campaign committee.

² McClelland won the Democratic primary on May 20, 2014, making her the Democratic nominee for the general election on November 4, 2014.

1 The Arche Wellness Foundation is a Pennsylvania non-profit corporation that offers
2 outpatient substance abuse rehabilitation and other mental health services. *See* Arche Wellness
3 Foundation, <http://archewellness.com/index.html>. McClelland, who is a psychologist and
4 addiction specialist, is the founder, president, and executive director of the Foundation. *See id.*;
5 Foundation Resp. at 1. Prior to the Foundation operating as a non-profit organization, it operated
6 as Arche Wellness, LLC, a Pennsylvania for-profit entity that appears to have served as
7 McClelland's private practice since 2006. *Id.* Arche Wellness, LLC and the Foundation appear
8 to have provided similar or identical outpatient substance abuse rehabilitation services. *Id.* The
9 Foundation states that it acquired the business and assets of Arche Wellness, LLC and began
10 operations as a non-profit corporation on August 1, 2013. *See id.*; Arche Wellness, LLC
11 Corporate Filings, available at [https://www.corporations.state.pa.us/corp/](https://www.corporations.state.pa.us/corp/soskb/Corp.asp?2461799)
12 [soskb/Corp.asp?2461799](https://www.corporations.state.pa.us/corp/soskb/Corp.asp?2461799).

13 The Complaint in this matter alleges that the Foundation paid for and disseminated a
14 television advertisement that featured McClelland within 90 days of the May 20, 2014, primary
15 election. Compl. at 1-2. The advertisement, which was posted on the Fox Pittsburgh YouTube
16 channel, lasts 15 seconds and features a visual of McClelland speaking directly to the camera.³
17 In the video, McClelland states:

18 I'm Erin McClelland of Arche Wellness, one of the most scientifically advanced
19 addiction recovery programs in the nation and the first of its kind to be licensed by the
20 PA Department of Health. We use intensive biochemical testing to identify and solve the
21 problem at its root cause. Call us or visit our website at ArcheWellness.com.⁴

³ The Complaint provides a link to the YouTube video of the advertisement. *See id.* Although this link no longer works, an archived version of the video is available in the Voting Ballot Matters folder.

⁴ This website contains no electoral content.

1 While McClelland is speaking, background graphics display McClelland's name, title as
2 executive director, and contact information for Arche Wellness. The Complaint asserts that the
3 advertisement was scheduled to air from March 30, 2014, to May 25, 2014. *Id.* at 1.

4 The Committee and the Foundation do not deny that the Foundation paid for and aired
5 the advertisement. Instead, their Responses argue that the advertisement was not a coordinated
6 communication because it did not refer to McClelland in her capacity as a federal candidate and
7 did not include any political message. *See* Committee Resp. at 1; Foundation Resp. at 2.

8 Respondents also argue that the advertisement qualifies for the safe harbor for
9 commercial transactions because McClelland appeared in similar television advertisements and
10 "otherwise has promoted Arche Wellness" throughout her association with the Foundation and
11 Arche Wellness, LLC. Committee Resp. at 2; Foundation Resp. at 2-3. The Foundation
12 submitted a sworn affidavit by McClelland, averring that "Arche Wellness has used me as its
13 spokesperson in television and radio advertisements through all seven years of its existence" and
14 that "on numerous occasions" she has "appeared in local television and radio broadcasts in
15 advertisements of Arche Wellness." Erin McClelland Aff. ¶4 (May 6, 2014) (attached to
16 Foundation Resp.). The affidavit also attaches an exhibit listing McClelland's appearances and
17 activities associated with Arche Wellness, LLC and the Foundation. *Id.*, Ex. A. The list,
18 however, appears to contain only television and radio interviews, conference appearances, and
19 published articles—not television and radio advertisements for Arche Wellness. *Id.*

20 According to contracts and invoices filed with the Federal Communications Commission
21 ("FCC"),⁵ McClelland purchased 441 advertising spots on behalf of the Foundation from WPGH

⁵ FCC regulations require broadcast stations to keep a public inspection file that contains a variety of information about each station's operations, including a "political file" with information about political time sold or given away by each station. *See* 47 C.F.R. §§ 73.3526(e)(6), 73.3527(e)(5). A political file must include all

1 and WPMY, two local Pittsburgh television stations. *See* WPGH-TV Political Files for Erin
2 McClelland for Congress, *available at* [https://stations.fcc.gov/station-profile/wpgg-tv/political-
4 files/browse-%3e2014-%3efederal-%3eus_house-%3eerin_mcclelland_for_congress](https://stations.fcc.gov/station-profile/wpgg-tv/political-
3 files/browse-%3e2014-%3efederal-%3eus_house-%3eerin_mcclelland_for_congress). These
5 spots were 15 seconds each, and scheduled to air from March 3, 2014, to June 15, 2014, between
6 11:30 pm and 4:59 am. *Id.* The contracts for these spots indicate that they cost \$2,205 in total,
7 or \$5 per spot. *Id.*

8 The contracts and invoices do not describe the contents of the specific advertisement that
9 aired in each spot, but the length of the spots and the identification of the Foundation and
10 McClelland as the advertiser and purchaser, respectively, suggest that the airtime purchased was
11 for the advertisement at issue in the Complaint. *Id.* Moreover, the Foundation has characterized
12 the advertisement as a "16 second commercial airing only in the early morning hours" and has
13 not disputed the Complaint's assertion that the advertisement was scheduled to air from March
14 30, 2014, to May 25, 2014, which further supports the inference that the airtime was purchased
15 for the advertisement in question. Foundation Resp. at 2.

16 **B. Legal Analysis**

17 Under the Act, corporations may not make contributions in connection with a federal
18 election and corporate officers may not consent to such contributions. 52 U.S.C. § 30118(a)
19 (formerly 2 U.S.C. § 441b(a)).⁶ A contribution includes a gift, subscription, loan, advance, or
deposit of money or anything of value made by any person for the purpose of influencing a

requests for specific schedules of advertising time by candidates, as well as the final dispositions or "deals" agreed to by the broadcaster and the advertiser. *See* About Public Inspection Files, <https://stations.fcc.gov/about-station-profiles/>. These files are available on the FCC website. *Id.*

⁶ The Complaint alleges that McClelland and the Committee accepted "in-kind contributions well in excess of federal limits and source prohibitions." Compl. at 2. Because the Foundation is registered as a corporation and may not make *any* contribution to a federal candidate, however, we do not address the issue of excessive contributions. *See* 52 U.S.C. § 30116(a) (formerly 2 U.S.C. § 441a(a)).

1 federal election. 52 U.S.C. § 30101(8)(A)(i) (formerly 2 U.S.C. § 431(8)(A)(i)). The term
2 “anything of value” includes in-kind contributions. 11 C.F.R. § 100.52(d)(1).

3 In-kind contributions include, among other things, expenditures made by any person “in
4 cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his
5 authorized political committees, or their agents.” 52 U.S.C. § 30116(a)(7)(B)(i) (formerly
6 2 U.S.C. § 441a(a)(7)(B)(i)). Under 11 C.F.R. § 109.21, a communication is coordinated if it:
7 (1) is paid for by a person other than the candidate or candidate’s committee; (2) satisfies one or
8 more of the four content standards set forth at 11 C.F.R. § 109.21(c); and (3) satisfies one or
9 more of the six conduct standards set forth at 11 C.F.R. § 109.21(d).

10 The payment prong is satisfied because it appears that the Foundation paid for the
11 advertisement. 11 C.F.R. § 109.21(a)(1). As discussed above, the Committee and the
12 Foundation do not deny that the Foundation paid for and aired the advertisement, and FCC
13 filings indicate that McClelland, who is president and executive director of the Foundation,
14 purchased 441 advertising spots for the Foundation.⁷

15 A communication satisfies the content prong if it is a public communication that (i) refers
16 to a political party or clearly identified candidate for federal office, (ii) is disseminated within 90
17 days of an election, and (iii) is targeted to voters in the jurisdiction of the clearly identified
18 candidate. 11 C.F.R. § 109.21(c)(4). McClelland is clearly identified in the advertisement

⁷ Although McClelland, and not the Foundation itself, is listed as the “buyer” on the contracts and invoices, the available information suggests that McClelland was purchasing air time in her capacity as president and executive director of the Foundation, and not in her personal capacity or in her capacity as candidate. See WPGH-TV Political Files for Erin McClelland for Congress, available at https://stations.fcc.gov/station-profile/wpghtv/political-files/browse-%3e2014-%3efederal-%3eus_house-%3cerin_mcclelland_for_congress (listing Arche Wellness as the “advertiser” and McClelland as the “buyer” of the advertising spots).

1 because it includes her name and image.⁸ 52 U.S.C. § 30101(18) (formerly 2 U.S.C. § 431(18))
2 (defining the term “clearly identified” to include the appearance of the candidate’s name or
3 photograph); 11 C.F.R. § 100.17 (same). The available information suggests—and Respondents
4 do not dispute—that the Foundation ran this advertisement within 90 days of the May 20, 2014,
5 primary election. *See* Compl. at 1; WPGH-TV Political Files for Erin McClelland for Congress,
6 available at [https://stations.fcc.gov/station-profile/wpgh-tv/political-files/browse-%3e2014-](https://stations.fcc.gov/station-profile/wpgh-tv/political-files/browse-%3e2014-%3efederal-%3eus_house-%3eerin_mcclelland_for_congress)
7 [%3efederal-%3eus_house-%3eerin_mcclelland_for_congress](https://stations.fcc.gov/station-profile/wpgh-tv/political-files/browse-%3e2014-%3efederal-%3eus_house-%3eerin_mcclelland_for_congress). And finally, the available
8 information suggests that the advertisement aired in the Pittsburgh area, which is within the 12th
9 Congressional District of Pennsylvania. *See id.* Therefore, the content prong appears to be
10 satisfied.⁹

⁸ Contrary to the assertions of Respondents, there is no requirement in 11 C.F.R. § 109.21(c)(4) that the candidate be clearly identified *as a candidate*. The Act’s definition of “clearly identified” includes the appearance of a candidate’s name or image in addition to other unambiguous references to the candidate’s identity, *see* 52 U.S.C. § 30101(18) (formerly 2 U.S.C. § 431(18)), and the Commission’s regulations further clarify that “clearly identified” includes candidate names or images *in addition to* “an unambiguous reference to his or her status as a candidate[.]” *See* 11 C.F.R. § 100.17. Thus, according to the Act and the Commission’s regulations, to “clearly identify” a candidate does not require identifying the candidate as a candidate. *Accord* Statement of Reasons of Comm’rs. Walther, Petersen, Bauerly, Hunter, and McGahn at 4, MUR 6013 (Friends of Peter Teahen, *et al.*) (concluding that candidate was clearly identified where advertisement identified him solely in connection with a funeral home bearing his name). Consequently, the fact that the advertisement referred to McClelland solely as Arche Wellness’s executive director does not change the fact that its use of her name and image clearly identified her within the meaning of the Act and Commission regulations.

⁹ The advertisement may also meet the content prong by being an electioneering communication. *See* 11 C.F.R. § 109.21(c)(1). The Act and Commission regulations define electioneering communications as any broadcast, cable, or satellite communication that (i) refers to a clearly identified candidate for federal office, (ii) is publicly distributed within 60 days before a general election or 30 days before a primary election, and (iii) in the case of a candidate for the House of Representatives, is targeted to the relevant electorate. *See* 52 U.S.C. § 30104(f)(3)(A)(i) (formerly 2 U.S.C. § 434(f)(3)(A)(i)); 11 C.F.R. § 100.29(a). As discussed above, the advertisement refers to McClelland, and it appears that at least some of the spots aired within 30 days of the primary and could have been received by 50,000 or more persons in McClelland’s district. Certain disclaimer and disclosure requirements apply to electioneering communications. *See* 52 U.S.C. §§ 30104(f) (formerly 52 U.S.C. § 434(f)), 30120 (formerly 2 U.S.C. § 441d); 11 C.F.R. §§ 104.20, 110.11. The available information, however, indicates that the Foundation did not exceed \$10,000 in advertisements, the minimum reporting threshold for electioneering communications. *See* 11 C.F.R. § 104.20. Moreover, while the advertisement contained no disclaimer, we do not recommend pursuing any potential disclaimer violations due to the low amount spent on the advertisement (\$2,205) and for the same reasons addressed below with regard to dismissing the coordination allegations.

1 A communication satisfies the conduct prong if it is made with the material involvement
2 of a candidate. 11 C.F.R. § 109.21(d)(2). In past cases, the Commission has concluded that a
3 candidate's appearance in an advertisement for his or her business is sufficient to conclude that
4 the candidate was materially involved in decisions regarding that communication. *See Factual &*
5 *Legal Analysis* at 5, MUR 5517 (Stork, *et al.*); *Factual & Legal Analysis* at 4-5, MUR 5410
6 (Oberweis, *et al.*). Here, McClelland not only appeared in the advertisement as a spokesperson,
7 but serves as president and executive director of the Foundation, and purchased the advertising
8 time in her own name. Therefore, McClelland was materially involved in the communication,
9 fulfilling the conduct prong.

10 Although the advertisement meets the regulatory requirements of a coordinated
11 communication, if any of the coordinated communication safe harbors apply, no in-kind
12 contribution results. The only safe harbor that might apply here is the safe harbor for business
13 transactions.¹⁰ 11 C.F.R. § 109.21(i); Coordinated Communications, 75 Fed. Reg. 55,947,
14 55,959 (Sept. 15, 2010). The safe harbor excludes from the definition of a coordinated
15 communication any public communication in which a federal candidate is clearly identified only
16 in his or her capacity as the owner or operator of a business that existed prior to the candidacy, so
17 long as the public communication does not promote, attack, support, or oppose that candidate or
18 another candidate who seeks the same office, and so long as the communication is consistent
19 with other public communications made by the business prior to the candidacy in terms of the
20 medium, timing, content, and geographic distribution. *Id.*

¹⁰ The other coordinated communication safe harbors cover certain inquiries about legislative or policy issues, endorsements and solicitations of federal candidates by other federal candidates, and the establishment of a firewall between a campaign and the person paying for the communication. *See* 11 C.F.R. §§ 109.21(f), (g), (h).

1 Because McClelland is identified solely in her capacity as executive director and the
2 Foundation's advertisement did not promote, attack, support, or oppose McClelland or any other
3 candidate, the safe harbor applies if the Foundation ran similar advertisements featuring
4 McClelland prior to her candidacy. As discussed above, both Responses generally assert that
5 McClelland appeared in similar advertisements for the Foundation and Arche Wellness, LLC.
6 *See* Committee Resp. at 2; Foundation Resp. at 2-3. McClelland also generally attests that she
7 has "appeared in local television and radio broadcasts and advertisements for Arche Wellness"
8 and states that the list she provides with her affidavit "details these appearances and activities."
9 *See* McClelland Aff. ¶4. That list, however, does not include any television commercials or
10 other similarly paid-for "advertisements." *Id.*, Ex. A. In other words, although Respondents
11 make a general assertion that McClelland appeared in television advertisements, McClelland's
12 affidavit detailing her activities does not support this general assertion, at least as it relates to
13 advertisements similar in medium, timing, and content to the one at issue here. McClelland
14 provides no examples that are similar in medium, timing, or content to the advertisement at issue
15 here.¹¹ Rather, McClelland specifically lists only television news and radio talk show interviews,
16 conference appearances, and newspaper and other published articles. *Id.* (listing seven purported
17 local news and morning show appearances between February 25, 2009, and April 8, 2011; nine
18 purported radio appearances between September 5, 2008, and January 6, 2011; two conference
19 appearances in 2009; and 25 purported articles published between November 16, 2003, and
20 October 12, 2010). Publicly available sources also do not indicate whether the Foundation ran

¹¹ The list of activities appears to be represented as an exhaustive list, and not merely as examples. *See* McClelland Aff. ¶4.

1 other advertisements that were similar in medium, timing, content, and geographic location.¹²

2 Therefore, the Respondents' assertion that the Foundation ran other similar television

3 "advertisements" prior to McClelland's candidacy falls short of meeting the safe harbor.

4 In sum, the advertisement was a coordinated communication and we have insufficient
5 information to conclude that the safe harbor for business transactions applies to this matter.

6 Thus, the Commission could find reason to believe that the advertisement was a prohibited in-

7 kind contribution from the Foundation to McClelland. Nevertheless, we recommend that the

8 Commission dismiss this matter. First, the available information indicates that the Foundation

9 spent only \$2,205 to purchase 441, 15-second spots that aired exclusively during the early

10 morning hours on two local stations. See WPGH-TV Political Files for Erin McClelland for

11 Congress, available at [https://stations.fcc.gov/station-profile/wpgh-tv/political-files/browse-](https://stations.fcc.gov/station-profile/wpgh-tv/political-files/browse-%3e2014-%3efederal-%3eus%20house-%3eerin%20mcclelland%20for%20congress)

12 [%3e2014-%3efederal-%3eus house-%3eerin mcclelland for congress](https://stations.fcc.gov/station-profile/wpgh-tv/political-files/browse-%3e2014-%3efederal-%3eus%20house-%3eerin%20mcclelland%20for%20congress). Second, at least on its

13 face, the advertisement solely promotes the *bona fide* business of the Foundation, and does not

14 contain any electoral content or promote, support, attack, or oppose McClelland or any other

15 candidate. Although we have no specific examples of other advertisements that were similar to

16 the advertisement in question in medium, timing, content, and geographic distribution, it is clear

17 that McClelland has been involved with Arche Wellness, LLC and the Foundation as a *bona fide*

18 founder and spokesperson since at least 2006. Accordingly, we recommend that the Commission

¹² The only other publicly available advertisement for Arche Wellness dated prior to McClelland's candidacy features a discussion of McClelland as executive director for approximately 25 seconds and displays her picture, but it is not narrated by her, runs for approximately three minutes long, and appears to be solely an online advertisement. See *North Pittsburgh Drug Rehab Pennsylvania Tri State Treatment Center "ARCHE WELLNESS" in PA*, DRUG REHAB TREATMENT CENTERS (Jan. 16, 2010), available at <http://www.youtube.com/watch?v=q4E7jgFb39o>. In addition, the Foundation website includes one video advertisement, but it does not feature McClelland. See Arche Wellness Media, <http://www.archewellness.com/media.html>. The FCC's public inspection files do not provide any other contracts or invoices for advertisements purchased by McClelland on behalf of Arche Wellness or the Foundation. However, as noted above, the public inspection files would only reflect spots purchased during her candidacy.

1 dismiss this matter pursuant to *Heckler v. Chaney*, 470 U.S. 821 (1985). See Statement of
2 Reasons of Comm'rs. Walther, Petersen, Bauerly, Hunter, and McGahn, MUR 6013 (Friends of
3 Peter Teahen, *et al.*) (dismissing allegations where a candidate's funeral home business paid for a
4 television advertisement featuring the candidate within 90 days of the election based on the low
5 dollar amount at issue, the lack of electoral content in the advertisement, and the specific factual
6 circumstances concerning the production and dissemination of the advertisement).


7 We also recommend, however, that the Commission send the Committee, McClelland,
8 and the Foundation letters of caution regarding the coordinated communications rules. Because
9 McClelland is currently a candidate, and the available information suggests that the
10 advertisement was in fact a coordinated communication, we believe that letters of caution would
11 ensure future compliance with the Act and Commission regulations.¹³


12 III. RECOMMENDATIONS

- 13 1. Dismiss the allegations that the Erin McClelland for Congress Committee and David
14 Lazear in his Official Capacity as Treasurer, Erin McClelland, and the Arche
15 Wellness Foundation violated 52 U.S.C. § 30118(a) and issue letters of caution.
16
- 17 2. Approve the attached Factual & Legal Analysis.
18
- 19 3. Approve the appropriate letters.
20

¹³ See Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12,545, 12,546 (Mar. 16, 2007) (stating that "dismissal with admonishment" is appropriate where complaint "convincingly alleges a violation, but the significance of the violation is not sufficient to warrant further pursuit by the Commission").

9-15-14
Date


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